

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 01-80361

vs.

HON. GEORGE CARAM STEEH

FREDERICK LAMARR MCCLOUD,

Defendant.

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**ORDER DENYING DEFENDANT'S MOTION TO COMPEL THE GOVERNMENT TO
FILE A RULE 35(B), FED. R. CRIM. P. MOTION**

On September 24, 2001, defendant Frederick Lamarr McCloud pleaded guilty to bank robbery, brandishing a firearm in furtherance of a crime of violence, using a destructive device in furtherance of a crime of violence, and illegally possessing a firearm after having been convicted of a felony. On August 16, 2006, after the United States Court of Appeals for the Sixth Circuit remanded this matter for re-sentencing with instructions to merge the crimes of brandishing a firearm and using a destructive device, this court imposed a sentence of 23 years imprisonment. See Am. Judgment, No. 196. The United States Court of Appeals for the Sixth Circuit affirmed this sentence on appeal. See United States v. McCloud, No. 06-2268 (6th Cir. Feb. 15, 2008). Presently before the court is defendant's motion to compel the government to file a Rule 35(b) motion for sentence reduction based on his testimony for the government in a 2009 prosecution in the United States District Court for the Southern District of Mississippi. For the reasons that follow, the court denies defendant's motion to compel the government to file a Rule 35(b) motion.

Defendant testified for the prosecution in the case of United States v. Gavin, case number 5:08cr00020-DCB-LRA, in the Southern District of Mississippi. The Assistant United States Attorney (AUSA) in Mississippi promised defendant that if he testified truthfully, she would recommend that the United States Attorney for the Eastern District of Michigan consider filing a Rule 35(b) motion to reduce defendant's sentence as a reward for his assistance with the Mississippi prosecution. See Mot., Ex. C. While the AUSA fulfilled her promise to make this recommendation, the criminal chief in this district declined to file a Rule 35(b) motion. See Mot., Ex. B.

This court has no authority to review the government's decision not to file a Rule 35(b) motion unless the decision was based on an unconstitutional motive, such as race, or because it was unconditionally promised in a plea agreement. See United States v. Benjamin, 138 F. 3d 1069, 1073 (6th Cir. 1998). Defendant argues that the decision not to file a Rule 35(b) motion was made in bad faith because the line AUSA was angry about defendant's conduct of filing liens against him and other federal employees. This court is without authority to review a prosecutor's refusal to file a substantial-assistance motion when the refusal is based on the prosecutor's bad faith. See United States v. Gates, 461 F. 3d 703, 711 (6th Cir. 2006). Therefore, defendant is not entitled to the relief sought in the present motion.

Accordingly,

Defendant's motion to compel the government to file Rule 35(b) motion [#239] is DENIED.

Defendant's motion for entry of default judgment [#244] is MOOT.

Defendant's motion for default judgment [#245] is MOOT.

SO ORDERED.

Dated: March 28, 2012

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon defendant/ attorneys of record and also to Frederick Lamarr McCloud at FCI Beaumont Low, P.O.Box 26020, Beaumont, TX 77720 on March 28, 2012, by electronic and/or ordinary mail.

S/Josephine Chaffee
Deputy Clerk